

FEDERAL CIRCUIT COURT OF AUSTRALIA

Nguyen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 193

File number(s): SYG 9

Judgment of: JUDGE DRIVER

Date of judgment: 18 March 2021

Catchwords: **MIGRATION** – Review of Administrative Appeals Tribunal decision – refusal of partner visas – applicant and sponsor found not to be in a genuine partner relationship – whether the Tribunal gave genuine consideration to the response to an invitation to comment or request for information or whether the Tribunal made unreasonable findings considered – jurisdictional error established.

Legislation: *Migration Act 1958* (Cth), ss 5F, 359, 359A, 359AA, 359C, 360, 424A, 424AA, 476
Migration Regulations 1994 (Cth)

Cases cited: *Appellant P119/2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 230
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
AVQ15 v Minister for Immigration and Border Protection [2018] FCAFC 133
Bakshi v Minister for Immigration & Anor [2015] FCCA 2092
Carrascalao v Minister for Immigration and Border Protection (2017) 252 FCR 352
Lafu v Minister for Immigration and Citizenship (2009) 112 ALD 1
Malek Fahd Islamic School Ltd v Minister for Education and Training (No 2) [2017] FCA 1377
Minister for Home Affairs v Omar [2019] FCAFC 188
Minister for Immigration and Border Protection v MZYTS (2013) 230 FCR 431
Minister for Immigration and Border Protection v SZSRS (2014) 309 ALR 67
Minister for Immigration and Citizenship v SZGUR [2011] HCA 1
Minister for Immigration and Citizenship v SZJSS [2010]

243 CLR 164

Minister for Immigration & Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

Minister for Immigration & Multicultural & Indigenous Affairs v Sun [2005] FCAFC 201

Muggeridge v Minister for Immigration and Border Protection (2017) 255 FCR 81

Navoto v Minister for Home Affairs [2019] FCAFC 135

Perera v Minister for Immigration and Multicultural Affairs (1999) 92 FCR 6

Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437

Reddy v Minister for Immigration & Anor [2020] FCCA 15

Singh v Minister for Immigration and Border Protection [2017] FCAFC 67

Singh v Minister for Immigration and Multicultural Affairs (2001) 115 FCR 1

Soltanyzand v Minister for Immigration and Multicultural Affairs [2001] FCA 1168

SZLGP v Minister for Immigration and Citizenship [2008] FCA 1198

Tickner v Chapman (1995) 57 FCR 451

WAIJ v Minister for Immigration & Multicultural & Indigenous Affairs (2004) 80 ALD 568

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Date of last submission/s:	15 February 2021
Date of hearing:	4 February 2021
Place:	Sydney
Counsel for the Applicants:	Ms T Baw
Solicitors for the Applicants:	HTT Law Firm
Counsel for the Respondents:	Mr M Cleary
Solicitors for the Respondents:	Mills Oakley

ORDERS

SYG 2263 of 2019

BETWEEN: HUNG CUONG NGUYEN
First Applicant

BA SONG TOAN NGUYEN
Second Applicant

BA SONG THANH NGUYEN (and another named in the
Schedule)
Third Applicant

AND: MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: JUDGE DRIVER

DATE OF ORDER: 18 MARCH 2021

THE COURT ORDERS THAT:

1. A writ of certiorari shall issue removing the record of the Administrative Appeals Tribunal decision made on 2 August 2019 into this Court for the purpose of quashing it.
2. A writ of mandamus shall issue requiring the Administrative Appeals Tribunal to redetermine according to law the review application before it.

REASONS FOR JUDGMENT

JUDGE DRIVER:

INTRODUCTION AND BACKGROUND

- 1 The applicants seek judicial review of a decision of the Administrative Appeals Tribunal (Tribunal) made on 2 August 2019. The Tribunal affirmed a decision of a delegate of the Minister (delegate) not to grant the applicants partner (residence) visas.
- 2 The following statement of background facts is derived from the submissions of the parties.
- 3 The applicants are Mr Nguyen and his children. On 12 April 2013, the first applicant, Mr Nguyen, applied for the visa on the basis of his spousal relationship with his sponsor, Ms Ngo, an Australian citizen.
- 4 Mr Nguyen is a citizen of Vietnam who first arrived in Australia on 12 January 2013 as the holder of a tourist (Subclass 676) visa, which was due to cease on 12 April 2013. The second, third and fourth applicants are Mr Nguyen's dependent children.
- 5 Mr Nguyen and Ms Ngo claimed to have met on 15 October 2010 in Ho Chi Minh City. Mr Nguyen proposed on 24 February 2013. On 7 April 2013, Mr Nguyen and Ms Ngo married. Mr Nguyen's children were from a previous relationship. Ms Ngo has one child from a former de facto relationship. On 28 August 2014, Mr Nguyen was granted a temporary partner visa. The second applicant had been included in that application as a dependent child. On 12 July 2016, Mr Nguyen submitted form 1002 to the Minister's Department to include his other two children (the third and fourth applicants) in his temporary partner visa.
- 6 On 28 April 2016, 12 July 2016, 11 August 2016 and 18 October 2016, the Minister's Department requested information to assist them in assessing the application for the permanent partner visa.
- 7 On 11 July 2017, the delegate refused to grant Mr Nguyen the partner visa, noting that no evidence had been provided in response to its requests for further information and he was therefore unable to find the parties were in a genuine and continuing relationship.
- 8 On 14 July 2017, the applicants applied to the Tribunal for review of the delegate's decision.

- 9 On 25 January 2018,¹ the Tribunal wrote to the applicants, requesting they provide further information in relation to the requirements under regulations 1.09A and 1.15A of the *Migration Regulations 1994* (Cth) (Regulations). The letter included a list providing examples of evidence for partner visa cases.
- 10 On 20 February 2018,² Mr Nguyen emailed the Tribunal, attaching statements for bank accounts in the parties' names, utility bills addressed to the parties, photographs of the parties together, airline tickets in the parties' names, greeting cards addressed to the parties, a certificate confirming Mr Nguyen had completed National WHS General Construction Induction Training and confirmation of Mr Nguyen registering an ABN.
- 11 On 23 October 2018,³ the Tribunal wrote to the applicants, inviting them to appear before it to give evidence and present arguments on 17 December 2018 and noting that it may wish to take evidence from Ms Ngo. The letter also requested Mr Nguyen provide copies of bank statements for the period December 2016-December 2018 for all accounts held in either joint names, the name of Mr Nguyen, or the name of Ms Ngo, including loan accounts and credit card statements. The letter further invited the applicants to submit additional evidence in relation to the financial and social aspects of the relationship, the nature of the household, and the nature of each person's commitment to the relationship.
- 12 Prior to the hearing, Mr Nguyen submitted a number of documents to the Tribunal.⁴
- 13 On 17 December 2018,⁵ the applicants and Ms Ngo appeared before the Tribunal to give evidence and present arguments.
- 14 At the hearing, Mr Nguyen handed a statutory declaration to the Presiding Member and indicated that he wished to rely on it to clarify information previously provided in an earlier application for a visa. The statutory declaration stated that Mr Nguyen was previously in a de facto relationship with the mother of his three children from 1 January 1994 to 9 March 2005; Mr Nguyen met Ms Ngo on 15 October 2010; an agent organised his travel to Australia in 2013 and as part of the process he was given a number of documents to sign; after his visitor

¹ Court Book (CB) 381.

² CB 598.

³ CB 613.

⁴ CB 616-712.

⁵ CB 741.

visa was granted he was advised that as part of the application it had been declared that he was still married to his former partner and was advised that was the only way it was possible to obtain the visa; on 30 November 2012 he was provided with a copy of a marriage certificate.⁶

15 Mr Nguyen advised the Tribunal he regretted what he had done and wanted to correct the mistake by making a full and frank declaration. Mr Nguyen declared that he did not marry his former partner and that he was in a genuine and continuing relationship with Ms Ngo.⁷

16 At the hearing on 17 December 2019, the Tribunal requested Mr Nguyen to provide further information in writing by 10 January 2019. The hearing was then adjourned.

17 On 17 December 2018, Mr Nguyen emailed the Tribunal, attaching further joint household expenses receipts and joint bank statements.

18 On 18 December 2018,⁸ the Tribunal wrote to the applicants, inviting them to attend a resumed hearing on 5 March 2019, noting it may wish to take evidence from Ms Ngo.

19 On 4 March 2019,⁹ the applicants appointed a legal representative, who wrote to the Tribunal attaching statutory declarations by Mr Nguyen and Ms Ngo and a friend of Mr Nguyen, further joint bank account statements, bank statements for Mr Nguyen's and Ms Ngo's respective personal accounts, statements for Ms Ngo's home loan account, aeroplane tickets and travel itinerary for a trip by the parties to Vietnam, utilities bills in the parties' names and additional photographs of the parties.

20 On 5 March 2019,¹⁰ the applicants and Ms Ngo again appeared before the Tribunal to give further evidence and present arguments. The applicants' representative also attended.

21 On 15 July 2019,¹¹ the Tribunal wrote to the applicants via their agent, inviting them to comment on inconsistencies in evidence given at hearing which it considered would be the reason or part of the reason for affirming the decision under review.

⁶ CB 1214 [20]-[21].

⁷ CB 1214 [22]-[23].

⁸ CB 749.

⁹ CB 897-1165.

¹⁰ CB 1166.

¹¹ CB 1173.

22 On 29 July 2019,¹² the applicants' agent provided further submissions and supporting evidence to the Tribunal.

23 On 2 August 2019,¹³ the Tribunal affirmed the decision of the delegate to refuse to grant the applicants permanent partner visas.

Tribunal decision

24 In its decision the Tribunal stated at [19] that it had considered the documents contained in the Minister's Department and Tribunal files as well as the oral evidence provided at the hearings by Mr Nguyen, Ms Ngo and witnesses, and the submissions received both before and after the hearing.

25 The Tribunal noted at [24], in respect of Mr Nguyen's statutory declaration and oral evidence at the first hearing regarding his previous marriage, that it had advised Mr Nguyen at the hearing that it considered the provision of false information to be a very serious issue and put Mr Nguyen on notice that it may lead to adverse credibility findings.

26 The Tribunal noted at [25] that there were a number of inconsistencies in the evidence given at the hearing and that it put these inconsistencies to the parties at hearing in accordance with s 359AA of the *Migration Act 1958* (Cth) (Migration Act). The inconsistencies were in respect of the following:

- (a) the parties living arrangements and when they commenced living together;
- (b) Mr Nguyen's employment;
- (c) whether Ms Ngo had met Mr Nguyen's sister;
- (d) whether Ms Ngo's sister's children live with Ms Ngo's mother;
- (e) what time Ms Ngo had departed to visit her mother and returned the Sunday prior to the hearing.

27 The Tribunal noted at [26]-[32] that it gave Mr Nguyen an opportunity to address the inconsistencies and that time was extended to the parties to make additional submissions. The Tribunal noted at [33] that it took post-hearing submissions made by Mr Nguyen into account in making its decision.

¹² CB 1187-1205.

¹³ CB 1210-1224.

- 28 The Tribunal, taking into account the totality of the evidence given over two days of hearing, considered the oral evidence of Mr Nguyen and Ms Ngo to be "confused, conflicting and unconvincing". The Tribunal was concerned "the parties frequently sought to adjust answers and sought wherever possible to evade giving an answer especially when the questions pertained to their finances and living arrangements". The Tribunal did not consider it plausible that the parties could fail to remember pertinent details about relatively large bank deposits and about their daily routines. The Tribunal was concerned that the parties gave deliberately vague answers in an attempt not to disclose any information they considered may be prejudicial to the claim. The Tribunal, at [34], was not satisfied the explanations given were sufficient to overcome the cumulative effect of the inconsistencies.
- 29 The Tribunal found that the cumulative effect of the inconsistencies coupled with the evasiveness of Mr Nguyen was such that the Tribunal did not consider Mr Nguyen to be a credible witness. The Tribunal further considered that, on the evidence of Mr Nguyen regarding his application for his visitor visa, there had been quite deliberate manipulation of the information provided by Mr Nguyen at various times in order to achieve a preferred migration outcome. The Tribunal did not find it plausible that Mr Nguyen was not aware of the provision of false information at the time of application, given that his oral evidence was that he applied for the visitor visa to come to Australia to visit Ms Ngo. The Tribunal noted at [35] if, on Mr Nguyen's evidence, he had never married his ex-wife as claimed, it followed that Mr Nguyen chose to further the falsified information by giving a translated and certified copy of divorce orders between him and his ex-wife at the time of the application for the partner visa.
- 30 The Tribunal noted Mr Nguyen's response to the matters purportedly raised under s 359AA. Mr Nguyen submitted that his memory was impacted by his medical conditions and referred to the letter submitted from his doctor. The Tribunal found that there was no evidence of the impact, if any, of Mr Nguyen's ability to give evidence at hearing and noted that the issue of Mr Nguyen's memory was only raised subsequent to the parties being put on notice of inconsistent evidence given. However the Tribunal accepted at [36] the medical evidence and took this into account when assessing Mr Nguyen's evidence.
- 31 The Tribunal noted that Mr Nguyen's post-hearing submissions also attributed some of his confusion to mistakes made by the interpreter and Mr Nguyen's fear of the interpreter. The Tribunal noted at [37] that there were no issues raised in respect of the accuracy of

interpreting at the time of hearing but appreciated there may have been confusion when translating words for relatives and accordingly did not attach weight to the inconsistent evidence about where Mr Nguyen's father-in-law lived. The Tribunal found at [38] that Ms Ngo was the "sponsoring partner" of Mr Nguyen pursuant to clause 801.221(2)(c) of the Regulations. The Tribunal further found at [40] that Ms Ngo and Mr Nguyen were validly married pursuant to s 5F(2)(a) of the Migration Act.

32 The Tribunal considered the parties' evidence in respect of the financial aspects of the relationship at [41]-[50]. The Tribunal found that there was a paucity of evidence to make findings that the parties had any joint ownership of assets, or that they pooled their financial resources or shared day-to-day expenses. The Tribunal further found the parties' evidence regarding whether Mr Nguyen gives Ms Ngo funds for daily household needs to be equivocal and accordingly did not find it persuasive evidence of shared household expenses. The Tribunal noted at [49] there was no evidence either party owed the other any legal obligations. The Tribunal, at [50], was unable to make findings on the evidence available that at the time of decision the financial aspects of the parties' relationship were indicative of being in a spousal relationship.

33 The Tribunal considered the nature of the parties' household at [51]-[54]. The Tribunal noted at [51] that the parties gave consistent evidence that they had resided together at their current address for six years with Mr Nguyen's three children and that they share housework, cooking and washing. The Tribunal found at [53] that the parties did not have any joint responsibility for the care and support of children and that the care of Mr Nguyen's children is primarily the responsibility of Mr Nguyen. The Tribunal was not satisfied at [54] that Mr Nguyen and Ms Ngo lived in a genuine and continuing relationship at any time and rather that "they were two individuals who have shared premises while awaiting a migration outcome".

34 The Tribunal considered the social aspects of the parties' relationship at [55]-[59]. The Tribunal accepted at [56], on the basis of the statutory declarations attesting to the genuineness of their relationship, the evidence given by Mr Nguyen's children and the photographic evidence submitted that the parties had socialised together with members of their immediate families and some mutual friends. The Tribunal noted at [57] that the parties had given consistent evidence regarding their social activities. The Tribunal noted at [58] that Ms Ngo's mother and Mr Nguyen's three children gave evidence at hearing indicative of their

support of the relationship. The Tribunal was satisfied at [59] that the parties' relationship was supported by Mr Nguyen's family and some friends and found that in weighing the available evidence regarding the social aspects of the parties' relationship, this was indicative of a couple in a genuine and continuing spousal relationship.

35 The Tribunal found at [60] the parties' evidence in respect of their commitment to one another to be confused and unconvincing and was not convinced there was a mutual commitment to the marriage. The Tribunal referred to the inconsistencies in the parties' oral evidence in respect of financial and family issues and found the lack of knowledge displayed was not indicative of a genuine and continuing relationship. The Tribunal found that it was not plausible to not know with some specificity the daily work patterns of your partner, or if your partner had previously been married if you were residing in a genuine and continuing relationship. The Tribunal was concerned at [61] that there was a lack of candour in the giving of evidence by both parties in an attempt to present their relationship as being genuine and continuing. The Tribunal was concerned that Mr Nguyen could not recall the time Ms Ngo spent each day caring for her mother or the living arrangements of the mother of Ms Ngo. The Tribunal found conflicts at [62] in evidence about recent events were either indicative of the event not taking place or not taking place in the manner described. The Tribunal placed considerable weight at [63] on these inconsistencies, finding it indicative that the parties do not communicate as claimed or do not know each other as well as parties in a committed relationship would.

36 The Tribunal was not satisfied at [65] on the evidence before it that the parties provide one another with companionship and emotional support, that they see the relationship as long term, or that they were committed to a shared life as husband and wife to the exclusion of all others. Given these findings, the Tribunal was not satisfied, on balance, that the parties were in a spousal relationship and accordingly found at [66]-[69] that Mr Nguyen did not meet clause 801.221(2)(c) of Schedule 2 to the Regulations. As Mr Nguyen did not meet the criteria for the grant of the visa, the Tribunal found at [72] that the second, third and fourth applicants could not meet the criteria for the visa as members of the family unit of a person who has satisfied the primary criteria and according affirmed the decision under review in relation to the secondary applicants.

THE CURRENT PROCEEDINGS

37 These proceedings began with a show cause application filed on 2 September 2019. The applicants now rely upon an amended application filed on 19 December 2019. There are two particularised grounds in that application as amended:

1. The second respondent (Tribunal) erred by failing to give a meaningful consideration to the submissions of the Applicant in reply to the Tribunal's invitation to comment or respond to information that the Tribunal considered would be the reason, or a part of the reason, for affirming the decision that is under review, pursuant to s.359A of the *Migration Act 1958* (Cth).

Particulars

- (a) By a letter, the Tribunal invited the Applicant to comment or respond in writing to a number of inconsistencies that it found in the evidence. The alleged inconsistencies and the full content of the letter from the Tribunal were reproduced in the Tribunal's statement of reasons.
 - (b) The Applicant, through his lawyer, replied in writing by providing a detailed typed 7 page letter (submissions).
 - (c) The submissions of the Applicant were material to the Tribunal's finding on his credibility and its ultimate decision.
 - (d) In contrast to the Tribunal's letter, none of the Applicant's submissions were reproduced or referred to in the Tribunal's statement of reasons. The Tribunal simply acknowledged the submissions as being received and merely noted that “[t]hose submissions have been taken into account” (D[33]).
 - (e) The Tribunal failed to engage with the submissions by giving them a meaningful and full consideration; failed to make any specific findings by reference to parts of the submissions; and the Applicant was left to guess what role, if any, the material submissions played in the decision.
 - (f) Furthermore, the Tribunal made generalised assertions on the Applicant's credibility without reference to the evidence, and which failed to disclose what consideration, if any, was given to the submissions.
 - (g) In the circumstances, the Tribunal failed to discharge its duty to consider by engaging in an active intellectual process with significant matters put forward by the Applicant.
2. In its assessment of matters in reg 1.15A(3) of the *Migration Regulations 1994* (Cth), the Tribunal erred by making findings that lacked any probative basis and/or were legally unreasonable.

Particulars

- (a) The Tribunal found at D[53] that the parties did not have any joint responsibility for the care and support of children. However, there were virtually no children living in the household. The Applicant's sons were adults and the daughter, was 17 years old.
- (b) At D[36], the Tribunal referred to the sponsor comment at the Tribunal hearing on the Applicant's medical condition. However, the Tribunal

misconstrued the question and response and used it to make an unfair conclusion out of context.

- (c) The Tribunal found at D[49] that: “[t]here was **no** evidence either party owed the other party any legal obligations” (emphasis added). However, that was without probative foundation because it failed to take into account the utilities and insurance that were in their joint names and the legal impact of their marriage.
- (d) The Tribunal accepted that the parties had been validly married since 2013. After taking into account the supporting statements from family and friends, and after hearing the oral evidence from the Applicant's 3 children (who reside in the same house) and from the sponsor's mother and photographic evidence, the Tribunal found that the social aspects [of] the parties' relationship “is indicative of a couple in a genuine and continuing spousal relationship” (D[59]). However, ultimately, the Tribunal found that the Applicant was “an individual person who resides with another while waiting for a migration outcome” (D66).

The Tribunal failed to expose how it reconciled the two inconsistent findings, and particularly how their close family and friends could be completely duped for the last 9 years.

38 I received as evidence the affidavit of Michael Ralph Purchas made on 3 February 2021, to which is annexed a transcript of the two hearings conducted by the Tribunal on 17 December 2018 and 5 March 2019. The affidavit replaces an earlier affidavit which annexed an incomplete transcript. The transcript annexed to the second affidavit contains some purported translations from Vietnamese by Mr Purchas which were objected to and which I did not receive.

39 I also have before me as evidence the court book in three volumes filed on 13 November 2019.

CONSIDERATION

Ground 1 – did the Tribunal fail to give meaningful consideration to the applicants’ response to the Tribunal’s invitation to comment?

Applicants’ contentions

40 The Full Federal Court in *Minister for Home Affairs v Omar*¹⁴ at [29] found that a decision-maker had made a jurisdictional error by failing to consider matters raised by the Minister in representations made as being a reason for revoking the visa cancellation decision under s 501CA(3) of the Migration Act. In reaching its conclusion the Full Federal Court held at [36]-[37] that the decision-maker had an obligation to engage in an active intellectual process with significant and clearly expressed representations made by the applicant.

¹⁴ [2019] FCAFC 188.

41 The Full Federal Court stated at [39] that meaningful consideration to a clearly articulated and substantial or significant representation on risk of harm requires more than the decision-maker simply acknowledging or noting that the representations have been made. The Full Federal Court explained that the decision-maker was required to “consider” those submissions by “having regard to what is said in the representations, to bring [its] mind to bear upon the facts stated in them and the argument or opinions put forward and to appreciate who is making them”.¹⁵

42 The Full Federal Court referred to a discussion on what is meant by the obligation of a decision-maker to “consider” a matter in the judicial review context in *Carrascalao v Minister for Immigration*.¹⁶ What is called for, in this regard, is an “active intellectual engagement” with matters raised on behalf of an applicant *Carrascalao* at [45]-[47]. The finding in *Carrascalao*, was applied by Griffiths J in *Malek Fahd Islamic School Ltd v Minister for Education and Training (No 2)*¹⁷ at [48]:

[o]ther authorities have indicated that, merely because a matter has been “touched upon” by a decision-maker, does not necessarily mean that it has been taken into account or considered in the relevant sense.

43 Findings at a high level of generality may be incapable of establishing that a decision-maker has “meaningfully engaged” with a given claim to fear harm upon removal to their country of nationality.¹⁸ Depending on the nature and content of the representations, a decision-maker:¹⁹

may be required to make specific findings of fact, including on whether the feared harm is likely to eventuate, by reference to relevant parts of the representations in order that this important statutory decision-making process is carried out according to law.

44 Given the centrality of the representations and serious consequences if they were not accepted, if the reasons in the Tribunal’s decision did not show an active intellectual engagement with the question of how the representations were taken into account, and therefore whether they were taken into account at all, then Mr Nguyen would be left to guess what role, if any, that the representation had played in the ultimate decision.²⁰

¹⁵*Tickner v Chapman* (1995) 57 FCR 451 and *Omar* at [36(c)].

¹⁶ (2017) 252 FCR 352.

¹⁷ [2017] FCA 1377.

¹⁸*GBV18 v Minister for Home Affairs* [2020] FCAFC 17 at [39] and [45].

¹⁹*Omar* at [39]; *GBV18* at [32(e)].

- 45 In the present case, by a letter dated 15 July 2019, the Tribunal invited Mr Nguyen to comment or respond to a number of alleged inconsistencies that it had found in the evidence.²¹ By letter dated 29 July 2019, Mr Nguyen’s legal representative replied to the letter addressing each of the alleged inconsistencies.²²
- 46 The Tribunal’s letter was reproduced in its decision in totality, however, in contrast nothing of the 7-page typed reply from Mr Nguyen was extracted, directly quoted, specifically referred to or summarised by the Tribunal in its decision record. The applicants contend that none of the particular replies were considered, in the required legal sense. The Tribunal is said to have failed to bring its mind to bear upon the explanations. Instead the Tribunal simply said in one sentence: “Those submissions have been taken into account in the making of the decision”.²³ The lack of detail or reference to any of those submissions is said to manifestly demonstrate the Tribunal’s failure to provide in an active intellectual engagement with those representations. The applicants submit that the Tribunal largely makes no finding one way or the other as to whether it accepted each of the representations, and Mr Nguyen is left to guess what role, if any his reply played in the decision.
- 47 The lack of consideration by the Tribunal is said to be particularly stark when it set out the alleged inconsistencies twice, first by five bullet points at CB 1215, and then repeated them again by reproducing the Tribunal’s letter at CB 1216-1217. In complete contrast, Mr Nguyen’s 7-page reply was dealt with by a generalised one-sentence assertion that they were taken into account at [33].²⁴
- 48 The applicants submit that these alleged inconsistencies had a serious consequence of the Tribunal making an adverse credibility finding against Mr Nguyen. The Tribunal went so far as to assert that the parties had “sought wherever possible to evade giving an answer”; were “deliberately vague” and there was “frequent shifting of evidence”.²⁵ However, the Tribunal did not support these assertions by reference to any of the representations made in the reply

²⁰*Lafu v Minister for Immigration and Citizenship* (2009) 112 ALD 1 at [49]; see also *Navoto v Minister for Home Affairs* [2019] FCAFC 135 at [86]-[89] and *Omar* at [36].

²¹see CB 1175-1177.

²²see CB 1189-1195.

²³CB 1217 [33].

²⁴CB 1217.

²⁵CB 1217 [34].

by Mr Nguyen. The Tribunal failed to back those assertions by identifying, referring to and making a finding on each of Mr Nguyen's explanations for the alleged inconsistencies. The Tribunal refers to the "cumulative effect" of those inconsistencies, but the decision fails to reveal any analysis of Mr Nguyen's responses. A consideration of those representations called for more than a sweeping statement, where the alleged inconsistencies were central to the Tribunal's decision.

49 In particular, the applicants contend that the Tribunal failed to consider the following explanations.

50 First, the Tribunal alleged that Mr Nguyen initially said that he lived in a house with his father-in-law, Ms Ngo and his three children. He then revised his evidence and said his father-in-law lived in Vietnam. Mr Nguyen explained that at the hearing, he misunderstood the question from a confusion between "Ba Vo" (wife) and "Ba Vo" (father-in-law) in the Vietnamese language. He states in his letter: "Mr Nguyen explained that he wanted to correct of [sic] mishearing the word "Ba Vo" but the interpreter shouted at him "shut up". Mr Nguyen mentioned that he was frightened of the interpreter and that [is] why he started to cry loudly as he was under pressure and stress".²⁶ This misunderstanding is consistent with the transcript of the hearing at T11(Annexure A) in which "[t]he applicant is crying and sobbing" and said, "I don't understand fully".

51 In his letter Mr Nguyen asked the Tribunal member to consider that he immediately tried to make the correction at the hearing as soon as he realised that he had misunderstood the word. The Tribunal did not refer to Mr Nguyen's explanation. However, it did state at [37]²⁷ that there may be confusion in translating words for "wife" and "father-in-law", and found "[f]or this reason the Tribunal does not attach weight to the evidence referred to above as to where the applicant's father-in-law lived". It is said to be equivocal from this finding, whether the inconsistency was resolved in favour of Mr Nguyen (Mr Nguyen also gave evidence that his father-in-law lived in Vietnam), and its impact on the adverse credibility finding is ambivalent.

52 Secondly, the Tribunal alleged that Mr Nguyen said that he had previously worked at a nail shop doing deliveries and it was for "3-4 days each week";²⁸ but Ms Ngo said that he had

²⁶CB 1190.

²⁷CB 1218.

²⁸CB1217 [31].

worked “5 days a week by the number of deliveries he did each day varied”.²⁹ The nature of the work, salary and method of payment was consistent between Mr Nguyen and Ms Ngo. The Tribunal took issue with the number of days. However, Mr Nguyen explained that Ms Ngo’s answer was “an average” and that she had added that her husband’s delivery job would be varied depending on whether there were sufficient delivery jobs available.³⁰

53 The transcript is consistent with Mr Nguyen’s explanation at T33(mid-way). The qualification made by Ms Ngo was that the average of five days was variable depending on number of deliveries needed, as demonstrated by the following exchange at T33(Annexure A):

M- And when he was working at the shop how many days did he work there?

S- **Variable when needed when there are things to get deliver.**

M- So on average how many days a week would he work?

S- He average 5 days a week but there are days he got two deliveries err other days three deliveries.

(applicant’s emphasis retained)

54 Mr Nguyen submitted that in fact there was no inconsistency, given Ms Ngo explained the variability dependent upon the number of deliveries, their answers were consistent. However, again, the Tribunal’s decision does not disclose this explanation, and Mr Nguyen, and a reviewing Court, is left to guess what analysis and resolution, if any, that the Tribunal made.

55 Thirdly, the Tribunal concluded that as Ms Ngo had said that she had not met any of Mr Nguyen’s siblings. This was allegedly inconsistent with what she said in her statutory declaration that she was particularly close to Mr Nguyen’s sister in France.³¹ However, Mr Nguyen explained that in relation to his sister in France, Ms Ngo had not met her in person but they spoke on the telephone. She made direct phone calls to the sister in France to notify her of Mr Nguyen’s health issues. On other occasions she spoke to her when Mr Nguyen made direct phone calls to her in France. She added that the sister in France is a financial supporter to Mr Nguyen’s family and they are very grateful to her.

56 The transcript of the Tribunal hearing showed that Ms Ngo’s clarification of what she meant by “close” in describing her relationship with the sister in France was consistent with the

²⁹CB1216 [31].

³⁰CB1191-1192.

³¹CB1217 [31].

nature of their relationship explained by Mr Nguyen's letter. At T20 (Annexure B) Ms Ngo said:

I mean by you know err greeting and enquiring about each other general health and conditions put us close to each other – put ourselves close to each other.

57 However, again, there was no examination of this explanation revealed in the Tribunal decision.

58 Fourthly, the Tribunal alleged an inconsistency in that Ms Ngo said that her mother lives alone in Cabramatta and sometimes her grandchildren stay over (the children of Ms Ngo's younger sister); whereas Mr Nguyen said that his mother-in-law lives with two of her grandchildren. Mr Nguyen explained that in fact his mother-in-law lives alone. Ms Ngo looked after her mother on a daily basis but Mr Nguyen only came to see her occasionally due to his skin problem. When he came to visit he thought that Ms Ngo's nieces were living with her mother. Mr Nguyen did not ask about this issue as it was unrelated to his life.³²

59 The nieces that Mr Nguyen saw when he would visit his mother-in-law are the same nieces that Ms Ngo said sometimes stayed over. The explanation provided by Mr Nguyen is reasonable and it is plausible that he would provide an answer based on what he observed since the couple had not discussed the living circumstances of the mother-in-law³³ (he had not come to see the mother-in-law for months). Again, any reference to or exploration of this explanation is omitted from the Tribunal decision, it merely asserted that the explanation was "not persuasive" at [62].³⁴

60 Lastly, the Tribunal alleged an inconsistency in that Ms Ngo said that on the Sunday prior to the hearing, she said that she was at her mother's house at around 10.00am and arrived home at midday; whereas Mr Nguyen said that she had gone to her mother's house around 8.00am and returned home around 4.00pm and 5.00pm.³⁵ The explanation provided by Mr Nguyen was that Ms Ngo was providing an answer to a specific day; whereas Mr Nguyen was providing a general answer, Ms Ngo went to care for her mother daily and the timing varied, he was giving a general timing.³⁶

³²CB 1193 [(4)b].

³³see at T22 (Annexure B).

³⁴CB 1221.

³⁵CB 1217[31].

³⁶CB 1193-4.

- 61 The transcript of the hearing shows that Mr Nguyen did indicate at first a general answer by stating at T27 (Annexure A): “Usually 4-5pm and err sometimes later it varies”. However, he was again asked specifically about Sunday and he replied, “about 4 or 5pm”. Mr Nguyen also explained that he could not remember the accurate time of a specific day as he suffered with his medical condition which impacted on his memory.³⁷ That is consistent with other parts of the hearing in which he refers to having a poor memory.³⁸ Also, there is consistency with another part of the hearing when Ms Ngo states that she ought to see her mum every day between 7.00pm and 8.00pm.³⁹ Again, the Tribunal failed to refer to, examine, or resolve Mr Nguyen’s explanation.
- 62 Also, the applicants assert that the Tribunal inaccurately referred to the aforementioned answers at [62]⁴⁰ without referring to the explanation and thereby incorrectly re-framed the alleged inconsistency. The specific alleged inconsistency was in respect to a particular day,⁴¹ but at [62],⁴² the Tribunal re-framed the alleged inconsistency to a generality by referring to Mr Nguyen’s inability to recall the time Ms Ngo cared for her mother each day, not on the specific Sunday in question.
- 63 The credibility of Mr Nguyen was central to the decision, and consideration of his explanations for the alleged inconsistencies had serious consequences. The applicants submit that the failure of the Tribunal to include any reference to or analysis of any of those five explanations is significant given that the Tribunal saw fit to describe the alleged inconsistencies in detail, not once but twice, however neglected to present Mr Nguyen’s comments and response to them. It is said to show that the Tribunal did not understand that its obligation was not to merely state wholesale that the representations had been taken into account, but to actively engage with them. In the particular circumstances of this case, given the nature of the findings, if the material had been considered, one could expect that it would be referred to, even if some of it were then rejected, or given little or no weight.⁴³ The failure

³⁷CB 1194.

³⁸for eg: T26 (Annexure A).

³⁹T22 (Annexure B).

⁴⁰CB 1221.

⁴¹as per the Tribunal’s letter at CB 1176.

⁴²CB 1221.

⁴³*Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 at [52] and *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67 at [32]-[34].

of the Tribunal to consider the response of Mr Nguyen is said to be indicative of a failure to exercise jurisdiction.

64 The applicants submit that an engagement with the representations and an assessment of each the explanations would have enabled the Tribunal to properly discharge its obligations to consider. It was material because if the Tribunal had properly engaged with the material it could have reached a different outcome. Instead it fell short of its duty to consider by hiding behind its sweeping statement at [33].⁴⁴

Minister's contentions

65 The Minister submits that the contention that the Tribunal failed to “engage in an active intellectual process” and “consider” the submissions dated 29 July 2019 provided by Mr Nguyen must be rejected, based upon the reasons for the Tribunal’s decision. The Tribunal expressly had regard to the content of the submissions provided. For example, the Tribunal had express regard at [31] to the following inconsistency raised in the s 359A invitation to comment, namely, the fact that Ms Ngo told the Tribunal that she lived in the house with Mr Nguyen and his oldest son from 2013 and that in 2016, Mr Nguyen’s two younger children came to live with them. Ms Ngo stated that she had purchased the house with her younger sister in 2002 and the mortgage was paid off in 2008, whereas Mr Nguyen stated in his submissions that he had moved into the house in August 2013, and that the house was owned by his father-in-law and that his father-in-law lived with them. This was inconsistent with the evidence of his statutory declaration which stated that they commenced living together in April 2013.

66 It is said to be evident that the Tribunal acknowledged Mr Nguyen’s submissions in regard to this inconsistency. At [37] the Tribunal acknowledged the submissions regarding the interpreter at the hearing, and confusion about the father-in-law’s address. The Tribunal noted no such complaint was raised at the hearing and found, in any event, it did not attach weight to any evidence regarding where Mr Nguyen’s father-in-law lived. Further at [51], the Tribunal found that they had given consistent evidence that they had resided together since their marriage in 2013. In making this finding it is said to be clear that the Tribunal expressly considered Mr Nguyen’s submissions.

67 The Minister submits that the Tribunal expressly stated that it had taken into account Mr Nguyen’s explanations for the inconsistencies at [33], but in light of the totality of the oral

⁴⁴ CB 1217.

evidence given by the parties at the two hearings, these explanations were insufficient to overcome the cumulative effect of the inconsistencies. The Tribunal explained at [34]-[35] that it was the combined effect of the inconsistencies coupled with Mr Nguyen's evasiveness at the hearing, and migration history, which evidenced a deliberate manipulation of information in order to achieve a migration outcome, which led the Tribunal to conclude that Mr Nguyen was not a credible witness). Based on the above, the Tribunal is said to have engaged in more than a high level generalised assessment of the submissions made by Mr Nguyen. It did far more than "touch on" the submissions, rather it actively engaged with them and assessed their veracity against the written and oral evidence given by Mr Nguyen at the hearing.⁴⁵ Further, there is no obligation on the Tribunal under the Migration Act to refer or recite the entirety of the submissions put by Mr Nguyen. Plainly, as the Tribunal decision makes clear, the substance of those submissions was considered by the Tribunal.

68 The Minister submits that the Tribunal's factual findings about Mr Nguyen's credibility and the credibility of his claims and evidence were open to it on the evidence given for the reasons it gave. The Tribunal was under no obligation to uncritically accept any and all claims made by Mr Nguyen.⁴⁶ Further, it is not open to the Court to re-assess the evidence given in writing or orally at the hearings. The fact finding function of the Tribunal is not reviewable under s 476 of the Migration Act. To allow this enquiry, in the context of determining whether the Tribunal had properly considered matters such as Mr Nguyen's written submissions, would be to encourage impermissible merits review.⁴⁷

69 The Minister submits that, to establish that Mr Nguyen was denied a fair hearing because of interpretation problems, he must show that either the standard of interpretation at the hearing was so inadequate that he was prevented from giving evidence to the Tribunal or errors made in interpretation at the Tribunal hearing were material to the conclusion of the Tribunal and adverse to him.⁴⁸ Mr Nguyen has not done so.

70 It is said to be evident that the Tribunal member took into account Mr Nguyen's claims regarding issues regarding interpreting and did not make any adverse findings with regard to

⁴⁵ see for example the Tribunals' conclusion in [33].

⁴⁶ *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437.

⁴⁷ see *Minister for Immigration and Citizenship v SZJSS* [2010] 243 CLR 164 at [30].

⁴⁸ see *Appellant P119/2002 v Minister for Immigration* [2003] FCAFC 230 at [17]; *Singh v Minister for Immigration* (2001) 115 FCR 1; *Perera v Minister for Immigration* (1999) 92 FCR 6; *Soltanyand v Minister for Immigration* [2001] FCA 1168.

the identified interpreter issues. Further, the Minister notes that, prior to the hearing, Mr Nguyen has only filed a transcript of the English component of the hearing which, by itself, does not provide evidence to establish jurisdictional error.⁴⁹

Resolution

71 Ground 1 contends that the Tribunal failed to give meaningful consideration to the submissions of Mr Nguyen in reply to the Tribunal's invitation to comment on or respond to information that the Tribunal considered would be the reason, or part of the reason for affirming the decision under review purportedly under s 359A of the Migration Act.

72 The particulars of Ground 1 contend that none of Mr Nguyen's submissions in response to the invitation to comment were reproduced or referred to in the Tribunal's statement of reasons. Mr Nguyen contends in his written outline of submissions that the Tribunal made generalised assertions on his credibility without reference to the evidence, and failed to disclose what consideration, if any was given to the submissions and therefore failed to discharge its duty to consider by engaging in an active intellectual process as required by the Full Federal Court, for example, in *Omar* at [29].

73 As a preliminary matter, there is uncertainty whether the Tribunal's letter to Mr Nguyen was an invitation to comment issued under s 359A of the Migration Act or a request for information under s 359 or something else. I gave the parties the opportunity to provide post hearing submissions on that question.

74 Counsel for the applicants provided supplementary submissions to my chambers on 11 February 2021.

75 In those submissions, the applicants point to the general statutory requirements supporting procedural fairness. The applicants draw a distinction between the obligation of disclosure arising under s 359A and s 359AA and the obligations to provide a fair hearing under s 360 of the Migration Act. In the present case, the Tribunal purported to proceed at the hearing under s 359AA but, when the applicants asked for more time, the matter was purportedly dealt with by letter under s 359A.

⁴⁹ As noted above, the Minister objected to those parts of the second transcript which purported to provide the deponent's interpretation of Vietnamese language passages.

76 In essence, the applicants submit that disclosure was required either under s 359A or s 360 and, in any event, the Tribunal had to take into account properly what it received in response to the invitation.

77 In supplementary submissions filed on 15 February 2021, the Minister submits, in essence, that s 359A had no application to the Tribunal's request.

78 In *Minister for Immigration v SZGUR*⁵⁰ French CJ and Kiefel J observed at [9], in the context of the analogue provisions to s 359A and s 359AA, namely s 424A and s 424AA in the Migration Act:

...the existence of "inconsistencies" and "contradictions" in an applicant's testimony and written submissions to the Tribunal is not "information" of the kind to which s424A is directed. As was explained by the plurality in *SZBYR v Minister for Immigration and Citizenship*, the term "information" in s 424A does not extend to the Tribunal's "subjective appraisals, thought processes or determinations"

79 As their honours went on to state in [9]:

That is not to say that the Tribunal cannot or should not, in the exercise of its discretion, invite an applicant for review to make supplementary submissions in relation to apparent inconsistencies, contradictions or weaknesses in his or her case which have been identified by the Tribunal. Indeed it may be that such an invitation, once issued, amounts to a binding indication by the Tribunal that the review process will not be concluded until the applicant has had an opportunity to respond. But an invitation to comment on perceived inconsistencies and contradictions is not an invitation under s 424A.

80 This is what happened in the present case. The Tribunal requested that Mr Nguyen make submissions in relation to apparent inconsistencies, contradictions, or weaknesses in relation to his case. The Minister contends that whilst the Tribunal asserts the request was made under s 359AA, for the reasons given by the High Court in *SZGUR* and *SZBYR*, because the request was made in relation to apparent inconsistencies, contradictions, or weaknesses in Mr Nguyen's case, the statutory obligations under s 359A were not enlivened.

81 The Minister submits that, contrary to the applicants' submission, the Tribunal was not obliged to take those submissions into account under s 359A. Had the Tribunal decided not to take them into account the Tribunal *would not* have breached s 359A. There are said to be two reasons for this. First, for the reasons outlined above, there is said to have been no "information" contained in the request for submission within the meaning of s 359A. Secondly, assuming the request did contain "information" within the meaning of s 359A, the Tribunal is said to have complied with its obligations under s 359A by giving Mr Nguyen the

⁵⁰ [2011] HCA 1.

opportunity to respond to the information at the hearing orally under the provisions of s 359AA.

82 In any event, the Tribunal gave Mr Nguyen until 29 July 2019 to respond and make submissions, and on 29 July 2019, he provided the Tribunal with his submissions. Ultimately, the Minister submits that the Tribunal took those submissions into account when making its decision.⁵¹

83 The Minister also submits that the Tribunal is not prohibited from taking into account information provided outside the prescribed period in ss 359A and 359AA.⁵² Further, the Tribunal is not bound to delay its decision making indefinitely until a response to a s 359A invitation is received. Section 359C(2) provided that if an applicant is invited to comment on or respond to information and does not provide the response before the time period expires, the Tribunal may make a decision on the review without taking any further action to obtain the applicant's view on the information.

84 In my view, three provisions of the Migration Act are potentially relevant here in relation to the Tribunal's request. One is s 359A; the second, as the applicants submit, is s 360. The third, as submitted orally at the trial by counsel for the Minister, is s 359. It is necessary to consider the precise terms of the letter and the circumstances in which it was sent to determine which, if any, provision governs the present circumstances.

85 The letter from the Tribunal to Mr Nguyen and the other applicants is reproduced at CB 1175-1177 and is relevantly in the following terms:

INVITATION TO COMMENT ON OR RESPOND TO INFORMATION – MR
HUNG CUONG NGUYEN, MISS BA HONG TRUC NGUYEN, MR BA SONG
THANH NGUYEN AND MR BA SONG TOAN NGUYEN

I am writing in relation to the applications for review made by you in respect of decisions to refuse to grant Partner (Residence) (Class BS) visas.

In conducting the review, we are required by the *Migration Act 1958* to invite you to comment on or respond to certain information which we consider would, subject to your comments or response, be the reason, or a part of the reason, for affirming the decisions under review.

Please note, however, that we have not made up our mind about the information.

There were a number of inconsistencies in the evidence given at the time of hearing

⁵¹See CB 1217 [33].

⁵²*Singh v Minister for Immigration and Border Protection* [2017] FCAFC 67 at [19]; *Minister for Immigration & Multicultural & Indigenous Affairs v Sun* [2005] FCAFC 201.

and these inconsistencies were put to the parties following the hearing in accordance with section 359AA of the *Migration Act*. The Presiding Member explained at the time of the hearing the relevance and the consequences of relying on that information. The discrepancies were as follows:

- The sponsor told the Tribunal she and the applicant had commenced living together in 2013. She said initially she lived with the applicant and his oldest son, in 2016 his younger two children came to live with them. She said that they lived in a house she had owned since 2002, having purchased it with her younger sister. She said the mortgage on the property had been paid off in 2008. This was not consistent with the evidence the applicant gave at the time of hearing. He initially said that he moved into the house where he presently lives in August 2013 and that the house was owned by his father-in-law, the sponsor and his three children. He then revised his evidence and said his father-in-law lived in Vietnam. He had not met him. It was put to the applicant that his evidence at hearing was inconsistent with his statutory declaration dated February 2019 in which he stated that he and the sponsor commenced living together in April 2013.
- The sponsor told the Tribunal that the applicant did not presently have a source of income. He had been helping with deliveries at the nail shop until June 2018 but he now has some health issues. When asked what those health issues were she said he has a skin issue, diabetes, liver problems, high blood pressure and a lung infection. She said he had previously worked five days a week by the number of deliveries he did each day varied. She said he had been paid \$300 per week and that amount was deposited into his Commonwealth Bank account. She said the shop he worked for was owned by his sister. This was inconsistent with the evidence given by the applicant that he works for a nail shop carrying and delivering goods. He said he works 3 – 4 days each week and he is paid \$300 per week. Those monies are deposited into his private bank account.
- The sponsor told the Tribunal that she had not met any of the applicant's siblings. This was not consistent with the evidence she gave in a statutory declaration that she was particularly close to the sister of the applicant who lives in France.
- The sponsor told the Tribunal that her mother lives alone in Cabramatta and that sometimes her grandchildren stay over. The younger sister of the sponsor has three children and the sponsor has one. This was not consistent with the evidence given by the applicant that the mother of the sponsor lives with two of her grandchildren in Cabramatta and that those children are the children of the sponsor's younger sister.
- The sponsor told the Tribunal that on the Sunday prior to the hearing she had gone to her mother's place around 10am and returned home at midday. This was inconsistent with the evidence of the applicant that the sponsor had gone to her mother's place around 8am and had returned between 4pm and 5pm.

This information is relevant because the Tribunal may find that you have provided false and misleading information to the Tribunal about your relationship with the sponsor. This might lead the Tribunal to find that you were not a credible witness and the partner relationship you claim does not exist.

You are invited to give comments on or respond to the above information in writing.

Your comments or response should be received by 22 July 2019. If the comments or response are in a language other than English, they must be accompanied by an English translation from an accredited translator.

If you cannot provide your written comments or response by 22 July 2019, you may ask us for an extension of time in which to provide the comments or response. If you make such a request, it must be received by us before 22 July 2019 and you must state the reason why the extension of time is required.

We will carefully consider any request for an extension of time and will advise whether or not the extension has been granted.

If we do not receive your comments or response within the period allowed, we may make a decision on the review without taking any further action to obtain your views on the information.

- 86 It is apparent that the Tribunal thought it was proceeding under s 359A both from the general terms of the letter and the express reference to the information having been raised orally at the hearing under s 359AA.
- 87 In *Bakshi v Minister for Immigration & Anor*,⁵³ Judge Smith stated at [41] that “information” carries the same meaning in both ss 359 and 359A. His Honour found in that case that the letter was a request under s 359 rather than s 359A. His Honour observed that the sections served different purposes in that s 359 gives the Tribunal power to obtain information and, if it does so, requires it to have regard to that information. By contrast, s 359A is aimed at providing an opportunity to an applicant to be aware of, and to be able to respond to, what might loosely be called adverse material.
- 88 I accept that, in general terms, information, whether used in s 359A or s 359 does not include inconsistencies in evidence provided by an applicant to the Tribunal. I do not, however, rule out the application of s 359A in circumstances where a witness called by an applicant provides oral evidence to the Tribunal, in response to questions from the Tribunal, which are both adverse to the applicant’s claims and unknown to the applicant. In those circumstances the evidence provided by the witness may go beyond a simple inconsistency to an undermining of an applicant’s claims.
- 89 The letter in the present case identifies a number of inconsistencies between Mr Nguyen’s evidence and that provided by Ms Ngo. In *Reddy v Minister for Immigration & Anor*⁵⁴ I stated the following at [53]-[56]:

The question is whether the Tribunal, in issuing a letter that performed, or purported to perform, the function of an invitation to invite comment or respond to adverse information, and of an invitation to give information, was issued under and complied with ss.359A(1) and 359(2). The issue arises in respect of the Tribunal’s decision record at [11] where the Tribunal determined that the invitation to Mr Reddy dated 5

⁵³ [2015] FCCA 2092.

⁵⁴ [2020] FCCA 15.

December 2018 was an invitation both under s.359A (to invite comment or response on adverse information) and under s.359(2) (to invite the giving of information).

There appears to be no authority directly on point. There are, however, some general principles which are not (or should not be) controversial. First, the Tribunal is not prohibited from sending a letter purportedly under s.359A of the Migration Act in circumstances where the obligation to send such a letter is not enlivened. It is often prudent for the Tribunal to send a letter in such circumstances, possibly because the Tribunal may be uncertain whether an obligation of disclosure has arisen, or because the Tribunal is concerned to ensure that an applicant is aware of a potentially determinative issue and given the opportunity to comment upon it.

Secondly, if the Tribunal issues a letter purportedly for the purposes of s.359A of the Migration Act in circumstances where the obligation to issue the letter was not enlivened, a failure by an applicant to respond to the purported invitation, either within the time prescribed or at all, has no consequence in terms of the procedural fairness obligations on the Tribunal under the Migration Act. So, for example, a failure to respond in such circumstances would not deprive the applicant of an entitlement to a hearing under s.360.

Thirdly, the Tribunal is entitled to combine an invitation to comment under s.359A and a request for information under s.359 in a single letter. That is well established in the authority referred to by the parties.

90 In the present case there is no indication that the Tribunal was seeking further information from Mr Nguyen in order to complete the review. In my view s 359 did not apply. The clear purpose of the letter was to invite his response and comment on what the Tribunal saw as inconsistencies in Mr Nguyen's evidence and between his evidence and that given by Ms Ngo. As I noted in *Reddy*, whether or not s 359A strictly applies, the provision of the letter is prudent in pursuit of the Tribunal's procedural fairness obligations, either under s 359A or s 360.

91 As to the latter, it is plain from the letter that the Tribunal saw the inconsistencies it had identified as going to Mr Nguyen's credibility which was thus likely to be a determinative issue in the review. It followed that it was important for the Tribunal to ensure that Mr Nguyen understood that and, having raised the matter orally at the hearing, and Mr Nguyen having asked for time to comment, the letter fulfilled a procedural fairness purpose.

92 The invitation having been extended and a reply received, the Tribunal came under an obligation to consider the response.

93 The submission provided in response to the invitation is reproduced at CB 1189-1195. Various documents are annexed to the submission between CB 1196-1206. Although on its face the submission dated 29 July 2019 is later than the date within which a response was

invited in the letter of invitation, the Minister conceded that the documents not in the court book revealed that an extension of time to 29 July 2019 had been sought and granted.

94 The submission reproduced in the court book contains handwriting up the top. The word “urgent” appears twice along with the name of Mr Nguyen, the type of visa and the case number. Although the submission is dated 29 July 2019 the court book does not disclose when it was received by the Tribunal or when the presiding member looked at it. The Tribunal decision was made four days later. Plainly, the Tribunal had limited time to consider the additional material. Equally plainly, the Tribunal was aware of the submissions and the additional documentary evidence because it referred to the submission at [33]. Importantly, however, there is no discussion in the Tribunal’s reasons about Mr Nguyen’s response to the matters reproduced verbatim at [31]. The Tribunal’s consideration of the material provided to it is otherwise detailed and comprehensive. The lack of discussion in relation to the final submission and the annexed documents is, in the context of the Tribunal’s reasons as a whole, incongruous, curious and surprising. To my mind, the circumstances give rise to an inference that the Tribunal did not engage in an active intellectual sense with the submission and documents provided.⁵⁵ It follows that I accept the applicants’ submissions in respect of Ground 1 and find that the error asserted in that ground has been established.

Ground 2 – did the Tribunal make findings which lacked a probative basis or were legally unreasonable?

95 *WAIJ v Minister for Immigration*⁵⁶ involved findings on the credibility of an applicant, Lee and Moore JJ after referring to High Court authorities found that the Tribunal may only make findings or inferences of fact grounded upon probative material and logical grounds, stating that (citations excluded):

[22] ...A determination based on illogical or irrational findings or inferences of fact will be shown to be a decision not supported by reason and to have no better foundation than an arbitrary selection of a result. It is because it is based upon such findings that the determination is an unreasoned decision. ...

[40] As noted above matters the Tribunal described as implausible were not claims disproved by proved facts nor events so contradicted by commonsense as to be able to be dismissed as possible occurrences. The Tribunal engaged in speculation as to what it thought would have been a more likely course of events but it had no basis on which it could say that the events described by the appellant, and corroborated in the documents, could not have occurred. The Tribunal may not have been persuaded that the events had occurred but the Tribunal had no material on which it could convert

⁵⁵ See *AVQ15 v Minister for Immigration and Border Protection* [2018] FCAFC 133 at [23].

⁵⁶ (2004) 80 ALD 568.

such a doubt into a positive finding that the events had not taken place.

96 *WAIJ* was referred to in *SZLGP v Minister for Immigration*,⁵⁷ a case in which the Tribunal repeatedly stated that it was “not convinced” about parts of the appellant’s evidence. Gordan J (as she then was) stated (citations excluded) at [24]-[25]:

I am of the view that those findings or inferences of fact are not grounded upon probative material and logical grounds.

Notwithstanding the breadth of the Tribunal’s discretion to make weight and credibility determinations, the requirement described in *WAIJ* to make those determinations “judicially” imposes limits that credibility and weight determinations be made rationally and logically, and be articulated properly. ...[F]or a migration Tribunal’s adverse credibility finding to survive appellate scrutiny, there must be a “legitimate articulable basis” for the Tribunal’s finding and the Tribunal “must offer a specific, cogent reason for any stated disbelief”.

97 Similarly, in *Muggeridge v Minister for Immigration*⁵⁸ Charlesworth J, with whom Flick and Perry JJ agreed, referred to Deane J *Australian Broadcasting Tribunal v Bond*⁵⁹ at 367–8 to find at [35](5):

When the process of decision-making is disclosed, there will be a discernible breach of the duty if findings of fact upon which a decision is based are unsupported by probative material and if inferences of fact upon which such a decision is based cannot reasonably be drawn from such findings of fact.

98 In the present case, the applicants contend that some of the specific matters contained in regulation 1.15A(3) are assessed by the Tribunal by reference to findings which lack any probative basis and/or were legally unreasonable, on the following basis.

99 First, the Tribunal found at [49]⁶⁰ that, “[t]here was no evidence either party owed the other party any legal obligations”. However, that finding is said to lack any probative foundation because it failed to take into account the utilities that were in the joint names of Mr Nguyen and Ms Ngo; and the very fact they were married meant that they owed each other legal obligations, for example it meant that each had a right to a division of the matrimonial property upon divorce, or that each had a right to receive the spouse’s social security, pension, workers compensation, or disability benefits. The Tribunal is said to have failed to consider what the legal obligations of the marriage itself would enliven when it determined there was “no evidence”.

⁵⁷ [2008] FCA 1198.

⁵⁸ (2017) 255 FCR 81.

⁵⁹ (1990) 170 CLR 321.

⁶⁰ CB 1220.

100 Secondly, the Tribunal found that Ms Ngo was asked at the hearing what impact the medical conditions of Mr Nguyen had on his functionality and Ms Ngo said there was no impact; he was still able to work and his skin being itchy was the only manifestation of his conditions at [36].⁶¹ However, that finding is said to have misconstrued the actual question and evidence given at the hearing and was made out of context. At the hearing, Ms Ngo was not being asked about the impact Mr Nguyen’s medical condition had on his memory or mental health; she was not even asked about his “functionality” generally; it was in a completely different context. Ms Ngo was being asked whether Mr Nguyen’s medical condition prevented him from working.⁶² Ms Ngo’s answer was in reply to that specific question. She states at T25 (Annexure B) that: “[h]e only got you know skin itchiness but doesn’t err really influence his work”.

101 The applicants contend that, contrary to the inference of the Tribunal’s finding, Ms Ngo’s evidence was not in made as a comment on Mr Nguyen’s ability to recollect information during a stressful Tribunal hearing, or the impact on his mental health. Her evidence was in respect to a completely different environment, namely his ability to continue working as a delivery driver for a nail salon.

102 A letter from Mr Nguyen’s medical doctor⁶³ explains that Mr Nguyen suffers from various conditions including extensive exfoliation of the skin that has gotten worse over the last few years, and that “[b]ecause of the ongoing problems, Mr Nguyen feels quite anxious and depressed and getting forgetsfull (sic)”.

103 Whilst the Tribunal states it has taken into account that medical evidence, the applicants submit that it has also misconstrued the evidence of Ms Ngo in respect to the impact of Mr Nguyen’s medical conditions. It is also is said to be “conflicting” for the Tribunal to state on the one had that it took into account the medical evidence, and then on the other hand state:⁶⁴

[t]here was **no** evidence of the impact, if any, of the condition on the applicant’s ability to give evidence at the hearing.

(applicant’s emphasis retained)

⁶¹CB 1218.

⁶²T25 (Annexure B).

⁶³ at CB 1196.

⁶⁴ CB 1218 [36].

- 104 Again, that finding of “no evidence” is said to be without any probative basis as the medical evidence states that Mr Nguyen is getting forgetful and he himself refers to his poor memory during the hearing.
- 105 The Tribunal found at [52]⁶⁵ that the couple did not have any joint responsibility for the care and support of the children. The applicants submit, however, that there were virtually no children living in the household. Of the three children of Mr Nguyen that lived with the couple, two were adults and the youngest was 17 years old. Therefore, it was not a very relevant matter to their circumstances.
- 106 The Tribunal also found that in respect to the social aspect of the relationship, it was satisfied at [59] that “their relationship is supported by the applicant’s family and some friends. In weighing all of the available evidence regarding the social aspects of the parties’ relationship, the Tribunal finds is indicative of a couple in a genuine and continuing spousal relationship.”
- 107 The Tribunal took into account evidence of numerous supporting statutory declarations attesting to the genuineness of their relationship; the oral evidence of Mr Nguyen’s three children at the hearing; and photographic evidence of the couple socialising together with their family and friends. The couple met on the 15 October 2010 and have been married since 30 November 2012. The aforementioned evidence spans the seven years of marriage and nine years that they have been together.
- 108 However, the ultimate decision of the Tribunal at [66] was that it was “not convinced the applicant resides at this location in a committed relationship with Ms Ngo, rather than as an individual person who resides with another while waiting for a migration outcome”.⁶⁶ The applicants assert that the Tribunal fails to explain how all of the corroborating third party evidence supports a genuine relationship but that did not convince the Tribunal. The “conflicting findings” should have been reconciled by the Tribunal. The inference is said to be that the couple are extremely skilled actors to have duped their friends and family (including those that live with them) for many years, but without any probative evidence that the couple had fooled everyone for so long. For the Tribunal to leave out how it reconciled its conflicting findings is said to be unreasonable as Mr Nguyen is left to guess what role if any, the substantial corroborating evidence played in the ultimate decision.

⁶⁵CB 1220.

⁶⁶CB 1222.

Resolution

109 Ground 2 (with four particulars) alleges that the Tribunal committed jurisdictional error in its assessment of matters in regulation 1.15A(3) of the Regulations by making findings that lacked any probative basis and/or were legally unreasonable.

110 I prefer and adopt the Minister's submissions in respect of this ground.

111 Particular 2(a) seeks impermissible merits review.⁶⁷ The Tribunal's finding that the parties did not have any joint responsibility for the care and support of children was open on the available evidence. The Tribunal made a factual finding at [53] that the parties did not have any joint responsibility for the care and support of children and that the care of Mr Nguyen's children was primarily the responsibility of Mr Nguyen. This factual finding was available on the evidence before the Tribunal.

112 Particular 2(b) misconstrues the Tribunal's findings. The Tribunal made no finding as to whether the fact that Ms Ngo's evidence with regard to the medical evidence was inconsistent with Mr Nguyen's evidence. On the contrary, the Tribunal accepted at [36] the medical evidence and took it into account when assessing Mr Nguyen's evidence.

113 Particular 2(c) takes issue with the Tribunal's finding that there was no evidence that either party owed the other party any legal obligation. Mr Nguyen contends that the Tribunal failed to consider the joint insurance and utilities and the legal impact of their marriage as legal obligations. With respect, that submission misconstrues the Tribunal's decision. The Tribunal was considering at [47]-[49] the financial aspects of the relationship and whether Mr Nguyen and Ms Ngo had any legal obligations relating to their finances, such as a joint mortgage. The Tribunal found at [50] that it was unable to make a finding that the financial aspects of the relationship were indicative of a spousal relationship.

114 Particular 2(d) contends that the Tribunal made inconsistent findings. Particular 2(d) seeks impermissible merits review as the social aspects of the relationship were merely one aspect that the Tribunal was obliged to consider. The conclusion that Mr Nguyen was residing with Ms Ngo while waiting a migration outcome was open to the Tribunal on the evidence before the Tribunal. Decisions under regulation 1.15A are evaluative decisions. The Tribunal's decisions in this matter was a decision based upon consideration of the requirements (under regulation 1.15A(3)) for determining whether a spousal relationship exists, and an evaluation

⁶⁷ see *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259.

of those requirements. Such an evaluative decision is a fact finding function for the Tribunal and not open to review under the Migration Act. Further, and in any event, properly understood and contrary to Mr Nguyen's argument, the two statements made by the Tribunal (and relied upon by Mr Nguyen in particular 2(d)) were not inconsistent. To say the social aspects of the relationship (one factor) is "indicative" of a spousal relationship, is not a conclusion that there was a spousal relationship. Mr Nguyen's argument misconstrues regulation 1.15A.

CONCLUSION

- 115 The applicants have established that the decision of the Tribunal is affected by jurisdictional error. The applicants should receive the relief they seek.
- 116 I will hear the parties as to costs.

I certify that the preceding one hundred and sixteen (116) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Driver.

Associate:

Dated: 18 March 2021

SCHEDULE OF PARTIES

SYG

Applicants

Fourth Applicant:

BA HONG TRUC NGUYEN